January 2004

MJI Publication Updates

Adoption Proceedings Benchbook

Crime Victim Rights Manual

Criminal Procedure Monograph 2—Issuance of Search Warrants (Revised Edition)

Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Criminal Procedure Monograph 7—Probation Revocation (Revised Edition)

Domestic Violence Benchbook (2d ed)

Juvenile Justice Benchbook (Revised Edition)

Managing a Trial Under the Controlled Substances Act

Sexual Assault Benchbook

Traffic Benchbook—Revised Edition, Vol. 1

January 2004

Update: Adoption Proceedings Benchbook

CHAPTER 3

Identifying the Father

3.8 The Paternity Act

J. Procedure

Replace the paragraph beginning "**Trial by Jury**" on page 116 with the following paragraph:

Trial by Jury. There is no right to a trial by jury in a paternity action. Effective June 5, 1998, 113 PA 1998, "Either party may demand a trial by jury" was deleted from MCL 722.715(1). Previously, MCR 3.217(B) provided that the mother or alleged father could demand a trial by jury. Effective December 23, 2003, the Michigan Supreme Court amended MCR 3.217 by eliminating 3.217(B). The Staff Comment on the amendment indicates that the amendment conforms the court rule to MCL 722.715(1), as amended by 113 PA 1998.

CHAPTER 4

Jurisdiction, Venue, and Petition Requirements

4.6 Petition Requirements

B. Persons Who May Not Adopt a Child

Effective December 2, 2003, 2003 PA 222 amended MCL 710.22a. MCL 710.22a provides that children may not be adopted by a prospective parent who has been convicted of a specified crime. Prior to the enactment of 2003 PA 222, a prospective parent convicted of a specified criminal sexual conduct crime could not adopt if the victim of the criminal sexual conduct crime was under the age of 18 at the time the crime was committed. 2003 PA 222 prohibits an individual convicted of one of the specified criminal sexual conduct crimes from adoption, regardless of the age of the victim of the criminal sexual conduct.

Therefore, please replace the bulleted list on page 138 with the following bulleted list:

- MCL 750.145a — Accosting, enticing or soliciting a child for immoral purposes. MCL 710.22a(a).
- MCL 750.145c(2) — Creating child sexually abusive material through knowingly persuading, inducing, enticing, coercing, causing, or allowing a child to engage in child sexually abusive activity, or the producing, making or financing of any child sexually abusive activity or material. MCL 710.22a(a).
- MCL 750.145c(3) — Distributing, promoting, or financing the distribution or promotion of any child sexually abusive material. MCL 710.22a(a).
- MCL 750.145c(4) — Possession of child sexually abusive material. MCL 710.22a(a).
- MCL 750.520b — First-degree criminal sexual conduct. MCL 710.22a(b).
- MCL 750.520c — Second-degree criminal sexual conduct. MCL 710.22a(b).
- MCL 750.520d — Third-degree criminal sexual conduct. MCL 710.22a(b).
- MCL 750.520e — Fourth-degree criminal sexual conduct. MCL 710.22a(b).

- MCL 750.520f — A second or subsequent criminal sexual conduct offense or any similar statute of the United States or other states including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit such an offense. MCL 710.22a(b).
- MCL 750.520g — Assault with intent to commit conduct involving penetration. MCL 710.22a(b).
- The law of another state substantially similar to one of the above enumerated crimes. MCL 710.22a(c).

CHAPTER 5

Temporary Placements, Investigation Reports, and the Safe Delivery of Newborns

5.3 Prohibited Placements

A. Conviction of Child Abuse or Criminal Sexual Conduct

Effective December 2, 2003, 2003 PA 222 amended MCL 710.22a. MCL 710.22a provides that children may not be placed with a prospective parent who has been convicted of a specified crime. Prior to the enactment of 2003 PA 222, a prospective parent convicted of a specified criminal sexual conduct crime could not have a child placed in his or her care if the victim of the criminal sexual conduct crime was under the age of 18 at the time the crime was committed. 2003 PA 222 amended MCL 710.22a to prohibit an individual convicted of one of the specified criminal sexual conduct crimes from having a child placed in his or her care, regardless of the age of the victim of the criminal sexual conduct.

Therefore, please replace the bulleted list beginning on page 164 with the following bulleted list:

- MCL 750.145a — Accosting, enticing or soliciting a child for immoral purposes. MCL 710.22a(a).
- MCL 750.145c(2) — Creating child sexually abusive material through knowingly persuading, inducing, enticing, coercing, causing, or allowing a child to engage in child sexually abusive activity, or the producing, making or financing of any child sexually abusive activity or material. MCL 710.22a(a).
- MCL 750.145c(3) — Distributing, promoting, or financing the distribution or promotion of any child sexually abusive material. MCL 710.22a(a).
- MCL 750.145c(4) — Possession of child sexually abusive material. MCL 710.22a(a).
- MCL 750.520b — First-degree criminal sexual conduct. MCL 710.22a(b).
- MCL 750.520c — Second-degree criminal sexual conduct. MCL 710.22a(b).
- MCL 750.520d — Third-degree criminal sexual conduct. MCL 710.22a(b).
- MCL 750.520e — Fourth-degree criminal sexual conduct. MCL 710.22a(b).

- MCL 750.520f — A second or subsequent criminal sexual conduct offense or any similar statute of the United States or other states including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit such an offense. MCL 710.22a(b).
- MCL 750.520g — Assault with intent to commit conduct involving penetration. MCL 710.22a(b).
- The law of another state substantially similar to one of the above enumerated crimes. MCL 710.22a(c).

CHAPTER 6

Formal Placement and Action on the Adoption Petition

6.2 Prohibited Placements

A. Conviction of Child Abuse or Criminal Sexual Conduct

Effective December 2, 2003, 2003 PA 222 amended MCL 710.22a. MCL 710.22a provides that children may not be placed with a prospective parent who has been convicted of a specified crime. Prior to the enactment of 2003 PA 222, a prospective parent convicted of a specified criminal sexual conduct crime could not have a child placed in his or her care if the victim of the criminal sexual conduct crime was under the age of 18 at the time the crime was committed. 2003 PA 222 amended MCL 710.22a to prohibit an individual convicted of one of the specified criminal sexual conduct crimes from having a child placed in his or her care, regardless of the age of the victim of the criminal sexual conduct.

Therefore, please replace the bulleted list beginning at the bottom of page 194 with the following bulleted list:

- MCL 750.145a — Accosting, enticing or soliciting a child for immoral purposes. MCL 710.22a(a).
- MCL 750.145c(2) — Creating child sexually abusive material through knowingly persuading, inducing, enticing, coercing, causing, or allowing a child to engage in child sexually abusive activity, or the producing, making or financing of any child sexually abusive activity or material. MCL 710.22a(a).
- MCL 750.145c(3) — Distributing, promoting, or financing the distribution or promotion of any child sexually abusive material. MCL 710.22a(a).
- MCL 750.145c(4) — Possession of child sexually abusive material. MCL 710.22a(a).
- MCL 750.520b — First-degree criminal sexual conduct. MCL 710.22a(b).
- MCL 750.520c — Second-degree criminal sexual conduct. MCL 710.22a(b).
- MCL 750.520d — Third-degree criminal sexual conduct. MCL 710.22a(b).
- MCL 750.520e — Fourth-degree criminal sexual conduct. MCL 710.22a(b).

- MCL 750.520f — A second or subsequent criminal sexual conduct offense or any similar statute of the United States or other states including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit such an offense. MCL 710.22a(b).
- MCL 750.520g — Assault with intent to commit conduct involving penetration. MCL 710.22a(b).
- The law of another state substantially similar to one of the above enumerated crimes. MCL 710.22a(c).

January 2004

Update: Crime Victim Rights Manual

CHAPTER 8

The Crime Victim at Trial

8.10 Expert Testimony on the Psychological Effects of Battering and Criminal Sexual Conduct

Replace the first paragraph and the quoted text of MRE 702 following the first paragraph on page 175 with this text:

Michigan Rules of Evidence 702–707 govern the use of expert testimony at trial. MRE 702* provides the standard for admissibility of expert testimony:

> "If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

*The amended text of MRE 702 is effective January 1, 2004.

Replace the second bullet on page 176 with the following:

After January 1, 2004, MRE 702, as amended, succeeds Michigan's *Davis/Frye* rule as primary authority governing the admissibility of expert scientific testimony. The amendments made to MRE 702 eliminated the rule's former requirement that expert testimony be derived from a "recognized" discipline. The amended rule's omission of the word "recognized" impacts the efficacy of those previous Michigan court decisions that addressed the admissibility of expert testimony based on whether the information was classified as a product of those scientific or technical disciplines "recognized" as credible sources at the time of the decision.

The staff comment to amended MRE 702 states:

> "The July 22, 2003, amendment of MRE 702, effective January 1, 2004, conforms the Michigan rule to Rule 702 of the Federal Rules of Evidence, as amended effective December 1, 2000, except that the Michigan rule retains the words 'the court determines that' after the word 'If' at the outset of the rule. The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999). The retained words emphasize the centrality of the court's gatekeeping role in excluding unproven expert theories and methodologies from jury consideration."

Daubert applies to scientific expert testimony; *Kumho Tire* applies *Daubert* to nonscientific expert testimony (e.g., testimony from social workers and psychologists or psychiatrists). *Daubert, supra* 509 US at 593–94, contains a nonexhaustive list of factors for determining the reliability of expert testimony, including testing, peer review, error rates, and acceptability within the relevant scientific community. See also MCL 600.2955, which governs the admissibility of expert testimony in tort cases, and which contains a list of factors similar to the list in *Daubert.*

To the extent that they do not conflict with MRE 702 and the guidelines contained in *Daubert* and *Kumho Tire*, cases decided under the *Davis/Frye* rule *may* provide guidance to trial courts to review the reliability of proffered expert testimony.

CHAPTER 9

Victim Impact Statements & Other Post-Disposition Procedures

9.5 Victim Participation in Parole Hearings

A. Parole Guidelines and Victim Impact Statements

Insert the following text after the bulleted information at the top of page 204:

Deciding an issue of first impression, the Michigan Court of Appeals held "that there is no requirement that the parole guidelines must conform to the sentencing guidelines." *Morales v Michigan Parole Board*, ___ Mich App ___, ___ (2003). In *Morales*, the defendant argued that he was unfairly denied parole because the parole board failed to score the defendant's parole guidelines consistently with scores received under the sentencing guidelines. *Id*. at ___. Citing to an Illinois court's decision on a similar issue, the Court of Appeals explained:

> "[T]he parole board here is not bound by the probation officer's calculations in the presentence investigation report, but may consider them in addition to the prisoner's institutional program performance, his institutional conduct, his prior criminal record, and any other relevant factor as determined by the Department of Corrections. MCL 791.233e(2). Likewise, the non-binding nature of the presentence report is in accord with Michigan law that parole boards have exclusive jurisdiction and discretion to parole a prisoner. MCL 791.204; MCL 791.234(9)." *Morales*, *supra* at ___.

January 2004

Update: Criminal Procedure Monograph 2—Issuance of Search Warrants (Revised Edition)

Part A — Commentary

2.14 Other Exceptions Applicable to Search Warrants

E. Exigent Circumstances Doctrine

Insert the following case summary on page 28 before the beginning of subsection (F):

A local ordinance permitting peace officers to require persons under the age of 21 to submit to a preliminary breath test analysis constitutes an unreasonable search not justified by any warrant exception. *Spencer v City of Bay City*, ___ F Supp ___ , ___ (ED Mich 2003). "Exigent circumstances" cannot be used to justify a warrantless search when the subject of the search is suspected only of committing a minor offense, and the primary purpose of conducting the search is to gather incriminating evidence against the individual. *Spencer*, *supra* at ___.

January 2004

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Part 2—Individual Motions

6.24 Motion to Dismiss Because of Double Jeopardy–Multiple Punishments for the Same Offense

Insert the following language at the top of page 57, immediately before Section 6.25:

Convictions for both felony-murder and the underlying felony violate the prohibition against double jeopardy. Where the defendant was convicted of assault with intent to commit armed robbery and the defendant's felony-murder conviction was based on the same assault conviction, the defendant's conviction and sentence for the underlying felony must be vacated. *People v Akins*, ___ Mich App ___, ___ (2003).

6.28 Motion to Suppress the Fruits of Illegal Police Conduct

Insert the following case summary on page 64 after the first paragraph:

Marijuana plants growing in a shed behind the defendant's house were inadmissible at trial because although the marijuana plants were in plain view from the police officer's vantage point in the defendant's backyard, the officer's entry into the defendant's backyard was unlawful. *People v Galloway*, ___ Mich App ___, ___ (2003).

In *Galloway*, *supra*, police officers entered the defendant's backyard after receiving an anonymous tip that marijuana was being grown there, and a police helicopter flew over the property and reported seeing pots and potting material in the defendant's yard. *Galloway*, *supra* at ___. In response to the defendant's assertion that the plain-view exception did not justify the warrantless search, the prosecution contended that the police officers—via their initiation of the "knock and talk" procedure—were lawfully in the defendant's backyard when they saw the marijuana plants in the defendant's shed. *Galloway*, *supra* at ___.

The Court of Appeals, first noting that the ordinary rules governing police conduct apply to circumstances surrounding a "knock and talk," explained the proper execution of the "knock and talk" procedure:

> "'Generally, the knock and talk procedure is a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in the illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items.'" *Galloway*, *supra* at ___, quoting *People v Frohriep*, 247 Mich App 692, 697 (2001).

The Court further stated that the police officers' claim that they were lawfully in the defendant's backyard by virtue of their "knock and talk" approach constituted a misuse of the tactic:

> "[T]he knock and talk visit can[not] be used as the premise for a warrantless entry of the backyard area of [a] defendant's home [and the warrantless entry cannot then] justify the seizure of evidence under the plain view exception to the search and seizure warrant requirement." *Galloway*, *supra* at ___.

In *Galloway*, *supra*, the Court concluded that the police officers did not conduct a "knock and talk"—rather, the officers bypassed the *front* door to the defendant's home and walked directly into the defendant's *back*yard where the marijuana plants were visible. *Galloway*, *supra* at ___. The plain-view

exception to the warrant requirement permits an officer to seize contraband in plain view only when the officer is lawfully in the position from which he or she sees the item, and only when the item itself is obviously incriminating. *Galloway*, *supra* at ___. If an officer has gained the position unlawfully, the plain-view exception does not apply. In *Galloway*, *supra*, the police officers' entry into the defendant's backyard was not lawful, and the plain-view exception did not apply to the marijuana plants seized from a shed in the defendant's yard. *Galloway*, *supra* at ___.

6.37 Motion to Suppress Evidence Seized Without a Search Warrant

3. Seizure of Items in Plain View

Insert the following text after the partial paragraph at the top of page 91:

Where police officers failed to justify their warrantless entry into a defendant's backyard under a "knock and talk" theory, the plain-view exception to the warrant requirement does not apply to the officers' seizure of contraband from a shed in the defendant's backyard. *People v Galloway*, ___ Mich App ___, ___ (2003). According to the Court, the officers did not attempt to "knock and talk" to the defendant—rather, the officers bypassed the defendant's *front* door and walked directly into the defendant's *back*yard. *Galloway*, *supra* at ___. Because the officers were not lawfully in the defendant's backyard, the plain-view exception did not apply to the marijuana plants in the defendant's shed. *Galloway*, *supra* at ___. The Court explained:

> "Knock and talk, as accepted by this Court in [*People v*]*Frohriep* [247 Mich App 692 (2001)], does not implicate constitutional protections against search and seizure because it uses an ordinary citizen contact as a springboard to a consent search. Fourth Amendment rights may be waived by a consent to search.
>
> "This case does not fit within the knock and talk framework. Helicopter surveillance coupled with ground law enforcement movement directly into the backyard of a private home is not an ordinary citizen contact. The knock and talk in this case is more aptly characterized as an investigatory entry of the back area of defendant's home. Such investigatory entry by law enforcement fails Fourth Amendment safeguards.
>
> "Moreover, the alleged knock and talk was not used as a springboard to secure defendant's permission for a search. Instead, it was used as a springboard to a plain view exception to the warrant requirement. This certainly is not the constitutional framework in which this Court accepted knock and talk in *Frohriep*. A predicate to the plain view exception is that the police have the right to be in the position to have that view." *Galloway*, *supra* at ____ (internal citations omitted)."

January 2004

Update: Criminal Procedure Monograph 7—Probation Revocation (Revised Edition)

Part A—Commentary

7.35 Granting Credit for Time Served

Insert the following text on page 32 immediately following the second full paragraph:

Where the defendant argued he was entitled to credit against a prison sentence for time spent in jail following his arrest for a parole violation and before trial on the offenses for which he was eventually sentenced, the Michigan Court of Appeals concluded it was bound by a previous panel's decision to remand the defendant's case to the trial court for modification of the defendant's sentence. *People v Seiders*, ___ Mich App ___, ___ (2003), referring to *People v Johnson*, 205 Mich App 144, 146-147 (1994).

Both *Seiders* and *Johnson* involve defendants on parole from convictions in other states, and both cases involve MCL 769.11b, which expressly applies to credits gained for time spent in jail "prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted...." In *Seiders*, the defendant asserted that MCL 769.11b entitled him to a sentence credit because the Michigan court was without jurisdiction to credit the sentence imposed against him in another state. Thus, the defendant argued, the credit must be given against the sentence imposed for his Michigan conviction. *Seiders*, *supra* at ___.

The *Seiders* Court disagreed with the defendant and explained that MCL 769.11b did not apply to the defendant's pretrial incarceration because he was in custody on a parole detainer, a status for which bond is neither set nor denied. *Seiders*, *supra* at ___. For this reason, the *Seiders* Court concluded that MCL 769.11b did not apply to the defendant's sentence and should not have been considered by the trial court when it imposed the defendant's sentence. *Seiders*, *supra* at ___. The Court also indicated that MCL 769.11b did not apply to the circumstances of the defendant's situation in *Johnson*; according to the *Seiders* Court, the statute should not have been considered by the *Johnson* Court in its decision. *Seiders*, *supra* at ___. Notwithstanding the

Court's disagreement with *Johnson*, *supra*, the Court considered itself bound by the decision and ruled accordingly. The case was remanded to the trial court for modification of the defendant's sentence to reflect credit for the time the defendant spent in jail following his arrest. *Seiders*, *supra* at ___.

January 2004

Update: Domestic Violence Benchbook (2d ed)

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.8 Expert Testimony on Battering and Its Effects

A. Criteria for Admitting Expert Testimony

Effective January 1, 2004, the Michigan Supreme Court amended MRE 702. Beginning on the bottom of page 160, replace the first paragraph and the quote of MRE 702 in subsection (A) with the following text:

Michigan Rules of Evidence 702 to 707 govern the use of expert testimony at trial. MRE 702 provides the standard for admissibility of expert testimony:

> "If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

The staff comment to amended MRE 702 states as follows:

> "The July 22, 2003, amendment of MRE 702, effective January 1, 2004, conforms the Michigan rule to Rule 702 of the Federal Rules of Evidence, as amended effective December 1, 2000, except that the Michigan rule retains the words 'the court determines that' after the word 'If' at the outset of the rule. The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael,* 526 US 137;

> 119 S Ct 1167; 143 L Ed 2d 238 (1999). The retained words emphasize the centrality of the court's gatekeeping role in excluding unproven expert theories and methodologies from jury consideration."

Daubert applies to scientific expert testimony; *Kumho Tire* applies *Daubert* to nonscientific expert testimony (e.g., testimony from social workers and psychologists or psychiatrists). *Daubert, supra* 509 US at 593–94, contains a nonexhaustive list of factors for determining the reliability of expert testimony, including testing, peer review, error rates, and acceptability within the relevant scientific community. See also MCL 600.2955, which governs the admissibility of expert testimony in tort cases, and which contains a list of factors similar to the list in *Daubert.*

Replace the last bullet on page 161 and last paragraph on pages 161-162 with the following text:

Effective January 1, 2004, MRE 702 eliminated its former requirement that expert testimony be based on knowledge "recognized" by the appropriate scientific community. After January 1, 2004, MRE 702, as amended, succeeds Michigan's *Davis/Frye* rule as primary authority governing the admissibility of expert scientific testimony. The amended rule's omission of the word "recognized" impacts the efficacy of those previous Michigan court decisions that addressed the admissibility of expert testimony based on whether the information was classified as a product of those scientific or technical disciplines "recognized" as credible sources at the time of the decision. To the extent that they do not conflict with MRE 702 and the guidelines contained in *Daubert* and *Kumho Tire*, cases decided under the *Davis/Frye* rule *may* continue to provide guidance to trial courts to review the reliability of proffered expert testimony.

January 2004

Update: Juvenile Justice Benchbook (Revised Edition)

CHAPTER 17

Designated Case Proceedings—Arraignments, Designation Hearings, and Preliminary Examinations

17.9 Scheduling of Preliminary Examination or Designation Hearing

Replace the second sentence of Section 17.9, page 399, with the following:

If the petition alleges an offense other than a specified juvenile violation and is authorized for filing, the court must schedule a designation hearing within 14 days. MCR 3.951(B)(2)(c)(ii). Administrative Order 1998-50, effective December 17, 2003, amended MCR 3.951(B)(2)(c)(ii) by eliminating the requirement to schedule the designation hearing "before a judge other than the judge who would conduct the trial." A referee may conduct designation hearings.

*For more information on a referee's ability to conduct designation hearings, see Section 17.10(A).

January 2004

Update: Managing a Trial Under The Controlled Substances Act

CHAPTER 13

Expert Testimony

13.1 The Michigan Test for Admissibility of Expert Testimony

Beginning with the third paragraph on page 283, replace the text of Section 13.1 with the following:

Michigan Rules of Evidence 702–707 govern the use of expert testimony at trial. MRE 702* provides the standard for admissibility of expert testimony:

> "If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

*The amended text of MRE 702 is effective January 1, 2004.

The amendments made to MRE 702 eliminated the rule's former requirement that expert testimony be derived from a "recognized" discipline. The amended rule's omission of the word "recognized" impacts the efficacy of those previous Michigan court decisions that addressed the admissibility of expert testimony based on whether the information was classified as a product of those scientific or technical disciplines "recognized" as credible sources at the time of the decision.

The staff comment to amended MRE 702 states:

> "The July 22, 2003, amendment of MRE 702, effective January 1, 2004, conforms the Michigan rule to Rule 702 of the Federal Rules of Evidence, as amended effective December 1, 2000, except that the Michigan rule retains the words 'the court determines that'

after the word 'If' at the outset of the rule. The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999). The retained words emphasize the centrality of the court's gatekeeping role in excluding unproven expert theories and methodologies from jury consideration."

CHAPTER 13
Expert Testimony

13.4 Evaluating the Reliability of Expert Testimony

Change the title to Section 13.4 as indicated above, and replace the text of the Section with the following:

After January 1, 2004, MRE 702, as amended, succeeds Michigan's *Davis/Frye* rule as primary authority governing the admissibility of expert scientific testimony. Effective January 1, 2004, MRE 702 eliminated its former requirement that expert testimony be based on knowledge "recognized" by the appropriate scientific community. MRE 702, as amended, provides:

> "If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

The staff comment to amended MRE 702 states:

> "The July 22, 2003, amendment of MRE 702, effective January 1, 2004, conforms the Michigan rule to Rule 702 of the Federal Rules of Evidence, as amended effective December 1, 2000, except that the Michigan rule retains the words 'the court determines that' after the word 'If' at the outset of the rule. The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999). The retained words emphasize the centrality of the court's gatekeeping role in excluding unproven expert theories and methodologies from jury consideration."

Daubert applies to scientific expert testimony; *Kumho Tire* applies *Daubert* to nonscientific expert testimony (e.g., testimony from social workers and psychologists or psychiatrists). *Daubert, supra* 509 US at 593–94, contains a nonexhaustive list of factors for determining the reliability of expert testimony, including testing, peer review, error rates, and acceptability within the relevant scientific community. See also MCL 600.2955, which governs

the admissibility of expert testimony in tort cases, and which contains a list of factors similar to the list in *Daubert.*

To the extent that they do not conflict with MRE 702 and the guidelines contained in *Daubert* and *Kumho Tire*, cases decided under the *Davis/Frye* rule *may* provide guidance to trial courts to review the reliability of proffered expert testimony.

January 2004

Update: Sexual Assault Benchbook

CHAPTER 3

Other Related Offenses

3.7 Child Sexually Abusive Activity

E. Pertinent Case Law

4. Definition of Terms

Insert the following case summary at the bottom of page 137:

"Distributes" is not defined in MCL 750.145c. In *People v Tombs*, ___ Mich App ___, ___ (2003), the Court of Appeals stated that the word "distributes" "comprises several definitions that each describe different conduct" and is therefore ambiguous. In order to provide meaning to the word "distributes," the Court turned to the legislative purpose behind the statute. The Court concluded that a narrow construction of "distributes" properly avoids criminalizing transferring material to authorities or disposing of material. Therefore, "distributing" requires the "intent to disseminate child sexually abusive materials to others." *Id.* at ___.

In *Tombs*, the defendant was convicted of distributing child sexually abusive material. As a part of the defendant's employment, he was given a laptop computer to use. When the defendant quit his job, the employer retrieved the laptop and found child sexually abusive material on the computer's hard drive. A jury found the defendant guilty of distributing child sexually abusive material for "distributing" the material through the laptop computer to his employer. On appeal, the defendant claimed that he did not intend to distribute child sexually abusive material. The defendant indicated that he believed the company was going to erase the hard drive without viewing its contents. The Court of Appeals reversed the defendant's conviction, holding that in order to prove that a defendant "distributed" the material, the prosecutor must prove that the defendant intended to disseminate the material. *Id.*

CHAPTER 3

Other Related Offenses

3.11 Dissemination of Sexually Explicit Matter to Minors

Effective January 1, 2004, 2003 PA 192 amended MCL 722.671 et seq., regarding the dissemination of sexually explicit matter to minors. Beginning on page 144, replace the text in Section 3.11, subsections (A), (B), (C), and (D) with the following text:

A. Statutory Authority—Disseminating and Exhibiting

*For purposes of this offense, a "minor" is a person under age 18. MCL 722.671(d).

A person is guilty of disseminating or exhibiting sexually explicit matter to a minor* under MCL 722.675(1) if that person does either of the following:

> "(a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.
>
> "(b) Knowingly exhibits to a minor a sexually explicit performance that is harmful to minors."

1. Mens Rea

"Knowingly disseminates" means that the person "knows both the nature of the matter and the status of the minor to whom the matter is disseminated." MCL 722.675(2).

A person knows the nature of the matter if the person is either "aware of its character and content" or "recklessly disregards circumstances suggesting its character and content." MCL 722.675(3).

A person knows the status of a minor if the person is "aware" that the minor is under 18 years of age or "recklessly disregards a substantial risk" that the minor is under 18. MCL 722.675(4).

2. Statutory Exceptions

MCL 722.675 does not apply to the persons, entities, and occupations under MCL 722.676(a)-(f), which are listed as follows:

> "(a) A parent or guardian who disseminates sexually explicit matter to his or her child or ward.
>
> "(b) A teacher or administrator at a public or private elementary or secondary school that complies with the revised school code [MCL 380.1-380.1852], and who disseminates sexually explicit matter to a student as part of a school program permitted by law.

"(c) A licensed physician or licensed psychologist who disseminates sexually explicit matter in the treatment of a patient.

"(d) A librarian employed by a library of a public or private elementary or secondary school that complies with the revised school code, [MCL 380.1-380.1852], or employed by a public library, who disseminates sexually explicit matter in the course of that person's employment.

"(e) Any public or private college or university or any other person who disseminates sexually explicit matter for a legitimate medical, scientific, governmental, or judicial purpose.

"(f) A person who disseminates sexually explicit matter that is a public document, publication, record, or other material issued by a state, local, or federal official, department, board, commission, agency, or other governmental entity, or an accurate republication of such a public document, publication, record, or other material."

B. Statutory Authority—Displaying

A person is guilty of displaying sexually explicit matter to a minor* under MCL 722.677(1)(a)-(b) if that person:

*For purposes of this offense, a "minor" is a person under age 18. MCL 722.671(d).

- Possesses managerial responsibility for a business enterprise selling sexually explicit visual material that depicts sexual intercourse or sadomasochistic abuse and is harmful to minors; and
- Does either of the following:
  - knowingly permits a minor not accompanied by a parent or guardian to view that matter; or
  - displays that matter knowing its nature, unless the person does so in a restricted area.*

*See Section 3.11(C) for the definition of "restricted area."

1. Mens Rea

"Knowingly permits" means that the person "knows both the nature of the matter and the status of the minor permitted to examine the matter." MCL 722.677(2).

A person knows the nature of the matter if the person is either "aware of its character and content" or "recklessly disregards circumstances suggesting its character and content." MCL 722.677(3).

A person knows the status of a minor if the person is "aware" that the minor is under 18 years of age or "recklessly disregards a substantial risk" that the minor is under 18. MCL 722.677(4).

C. Relevant Statutory Terms

"Display" means "to put or set out to view or to make visible." MCL 722.671(a).

"Disseminate" means "to sell, lend, give, exhibit, show, or allow to examine or to offer or agree to do the same." MCL 722.671(b).

"Exhibit" means to do one or more of the following:

> "(*i*) Present a performance.
>
> "(*ii*) Sell, give, or offer to agree to sell or give a ticket to a performance.
>
> "(*iii*) Admit a minor to premises where a performance is being presented or is about to be presented." MCL 722.671(c).

"Restricted area" means any of the following:

> "(*i*) An area where sexually explicit matter is displayed only in a manner that prevents public view of the lower 2/3 of the matter's cover or exterior.
>
> "(*ii*) A building, or a distinct and enclosed area or room within a building, if access by minors is prohibited, notice of the prohibition is prominently displayed, and access is monitored to prevent minors from entering.
>
> "(*iii*) An area with at least 75% of its perimeter surrounded by walls or solid, nontransparent dividers that are sufficiently high to prevent a minor in a nonrestricted area from viewing sexually explicit matter within the perimeter if the point of access provides prominent notice that access to minors is prohibited." MCL 722.671(e).

"Harmful to minors" means sexually explicit matter that meets all of the following criteria:

> "(*i*) Considered as a whole, it appeals to the prurient interest of minors as determined by contemporary local community standards.
>
> "(*ii*) It is patently offensive to contemporary local community standards of adults as to what is suitable for minors.
>
> "(*iii*) Considered as a whole, it lacks serious literary, artistic, political, educational, and scientific value for minors." MCL 722.674(a).

For definitions of "sexually explicit matter," "sexually explicit performance," "sexually explicit verbal material," and "sexually explicit visual material," see MCL 722.673.

D. Penalties

A violation of disseminating or exhibiting sexually explicit matter to a minor under MCL 722.675(1) is a felony punishable by imprisonment for not more than 2 years or maximum $10,000.00 fine, or both. MCL 722.675(5). When imposing the fine, the court shall consider the scope of defendant's commercial activity in disseminating sexually explicit matter to minors. *Id*.

A violation of displaying sexually explicit matter under MCL 722.677(1) is a misdemeanor punishable by imprisonment for not more than 93 days or a maximum $5,000.00 fine, or both. MCL 722.677(5).

CHAPTER 8

Scientific Evidence

8.2 Expert Testimony in Sexual Assault Cases

A. General Requirements for Admissibility of Expert Testimony

Effective January 1, 2004, the Michigan Supreme Court amended MRE 702. On the bottom of page 400 and the top of page 401, replace the first paragraph of subsection (A) and the note with the following text:

MRE 702 provides the standard for admissibility of expert testimony:

> "If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

The staff comment to amended MRE 702 states as follows:

> "The July 22, 2003, amendment of MRE 702, effective January 1, 2004, conforms the Michigan rule to Rule 702 of the Federal Rules of Evidence, as amended effective December 1, 2000, except that the Michigan rule retains the words 'the court determines that' after the word 'If' at the outset of the rule. The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael,* 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999). The retained words emphasize the centrality of the court's gatekeeping role in excluding unproven expert theories and methodologies from jury consideration."

Daubert applies to scientific expert testimony; *Kumho Tire* applies *Daubert* to nonscientific expert testimony (e.g., testimony from social workers and psychologists or psychiatrists). *Daubert, supra,* 509 US at 593–94, contains a nonexhaustive list of factors for determining the reliability of expert testimony, including testing, peer review, error rates, and acceptability within the relevant scientific community. See also MCL 600.2955, which governs the admissibility of expert testimony in tort cases, and which contains a list of factors similar to the list in *Daubert.*

Replace the last bullet on the bottom of page 402 and the first paragraph and note on page 403 with the following text:

Effective January 1, 2004, MRE 702 no longer contains its former requirement that expert testimony be based on knowledge "recognized" by the appropriate scientific community. After January 1, 2004, MRE 702, as amended, succeeds Michigan's *Davis/Frye* rule as primary authority governing the admissibility of expert scientific testimony. The amended rule's omission of the word "recognized" impacts the efficacy of those previous Michigan court decisions that addressed the admissibility of expert testimony based on whether the information was classified as a product of those scientific or technical disciplines "recognized" as credible sources at the time of the decision. To the extent they do not conflict with MRE 702 and the guidelines contained in *Daubert* and *Kumho Tire*, cases decided under the *Davis/Frye* rule *may* provide guidance to trial courts to review the reliability of proffered expert testimony.

January 2004

Update: Traffic Benchbook—Revised Edition, Volume 1

CHAPTER 3

Misdemeanor Traffic Offenses

Part B—Misdemeanors Involving Accidents

3.11 Failing to Report Accident Involving Death, Personal Injury, or Property Damage of $1,000 or More

A. Applicable Statute

Change the dollar amount in the title of Section 3.11 from $400 to $1,000, and replace the text in subsection (A) on page 3-9 with the following:

Effective January 1, 2004, 2003 PA 66 increased the minimum dollar amount of property damage required by MCL 257.622. In part, MCL 257.622 provides:

> "The driver of a motor vehicle involved in an accident that injures or kills any person, or that damages property to an apparent extent totaling $1,000.00 or more, shall immediately report that accident at the nearest or most convenient police station, or to the nearest or most convenient police officer."

B. Elements of the Offense

In the second sentence at the top of page 3-10, change $400 to $1,000.